Filed 11/24/08 In re Jesus P. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JESUS P., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JESUS P., Defendant and Appellant.	G040007 (Super. Ct. No. DL030003) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick P. Aguirre, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillete, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

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On an early evening on December 6, 2007, a group of teenagers stole some ice cream from an elderly (almost 70-years old) ice cream vendor, then soon surrounded and attacked a young man who had an iPod. Jesus P., who was just shy of 14 years old at the time, was later adjudged a ward of the court based on his participation in the two thefts, with the court finding true allegations of one count of robbery (Pen. Code, § 211[1]) and one count of petty theft (§§ 484, 488). On appeal, he contends that there was insufficient evidence (1) that he participated in the ice cream theft and (2) that he knew his acts were wrongful (see § 26 [requiring clear and convincing evidence juvenile offenders under age of 14 knew about wrongfulness of the act charged against them]). We affirm.

I. FACTS

On December 6, 2007, at approximately 5:40 p.m., a group of male teenagers wearing hoods stole some ice cream from an elderly female ice cream cart vendor. When a bystander from across the street approached, the teenagers ran away.

But the bystander kept watching, and saw the same group run down the street and surround a young man. The bystander did not lose sight of the pack for more than a second or two.

Like the bystander, the young man would later testify. He related that a group of male teenagers walked past him, and asked him for money. The young man responded that he didn't have any, the group continued walking, then turned around and chased him. Someone choked him from behind, threatened to stab him, and stole his iPod. The others surrounded him so he couldn't run away.

Then the bystander approached. The teenagers saw him and fled.

There were three witnesses at Jesus' trial. *The bystander* identified Jesus as having been in the same group that both stole the ice cream and attacked the young man. The *young man* identified Jesus as among the group that surrounded him, though not the one who choked him or stole his iPod. But the *elderly ice cream vendor* testified that Jesus was *not* one of the individuals who took her ice cream. While she did not see the

[1] All further undesignated statutory references will be to the Penal Code.

perpetrators' faces, she stated Jesus was not one of them because, unlike Jesus, they were tall and thin.

The trial court opined that the bystander's testimony was not enough, by itself, to connect Jesus with the ice cream theft. The court thought that the bystander could not see "closely enough" to make a "positive identification."

However, because the *young man* with the iPod identified Jesus as one of those who attacked him, and because the bystander saw the *same group* of youths attack the ice cream vendor, the court concluded that the ice cream theft was true.

II. DISCUSSION

A. *The Petty Theft Conviction*

Jesus' appeal is rooted in an attempt to discredit one part of the bystander's testimony -- that the *same group* participated in both attacks -- based on the idea that the court did not accept the bystander's testimony that Jesus, *specifically*, was one of the youths involved in the ice cream theft.

As a simple matter of substantial evidence and logic, however, it does not follow that the bystander's testimony, *as regards the group as a whole*, falls with the judge's rejection of the bystander's specific identification of one of the group's members. The bystander testified that he watched the *same group* of five teenagers participate in the ice cream theft and the robbery. He also tracked the movement of the teenagers from the time they approached the ice cream cart until they surrounded the young man.

A group of youths, running in a pack, is visible even in relative darkness from across a street in a way that a single face is not. Thus it does not follow that just because the bystander's identification of Jesus was not accepted that Jesus was necessarily excluded as a member of the group. The bystander saw the teenagers until they surrounded the young man, and, *at that point*, the *young man* was able to view the teenagers from less than a foot away, *he* independently identified Jesus as one of the five, and the court accepted *that* identification. In short, the chain is complete. It is a reasonable inference that because Jesus was *definitely* among the group that attacked the young man, he was *necessarily* among the group that attacked the ice cream vendor. The

idea that Jesus quickly substituted in for a departing member of the assault team in the one or two seconds that the bystander might have blinked as the bystander saw the group first attack the ice cream vendor, then the young man, is a bit silly. The only reasonable scenario was that Jesus was part of the same group all the time. The fact that the ice cream vendor testified that Jesus was not part of the group is simply a matter of conflicting evidence, resolved on appeal in favor of the trial court's judgment. (See, e.g., *In re Juan G.* (2003)112 Cal.App.4th 1, 5 ["on appeal all conflicts in the evidence and attendant reasonable inferences are resolved in favor of the judgment"].)

B. *Knowledge of Wrongfulness*

If the crimes had taken place a mere eight days later, there would be no "section 26" issue in this case -- Jesus' birthday is December 13; these crimes were committed on December 6. Section 26 is a criminal capacity statute, essentially exempting certain categories of persons from the criminal law.[2] As to children under the age of 14, the rule is that they are exempt, *unless* there is clear and convincing evidence they knew of the wrongfulness of the "act charged against them."[3]

Preliminarily, we should note that the phrase "act charged against" refers to the underlying crime which an aider and abettor promotes, as distinct from aiding and abetting, by itself, in a vacuum. As the court explained in *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1190: "However, aiding and abetting is one means under which derivative liability for the commission of a criminal offense is imposed. It is not a separate criminal offense. . . . As an aider and abettor, *it is the intention to further the acts of another which creates criminal liability*. . . . If the principal's criminal act which is charged to the aider and abettor is a reasonably foreseeable consequence to any criminal act of that principal, and is knowingly aided and abetted, then the aider and abettor of such criminal act is *derivatively liable for the act charged*." (Italics added.)

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[2] A basic explanation of the statute was provided by our high court in *In re Manuel L.* (1994) 7 Cal.4th 229.

[3] Thus the first category of section 26 is: "All persons are capable of committing crimes except those belonging to the following classes: [¶] One--Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness."

The point is -- the prosecutor here was not required to prove that Jesus understood the legal intricacies of derivative liability or aiding and abetting, only that the criminal act itself was wrong. The question is not whether Jesus understood that aiding and abetting a crime is wrong, but whether he understood that stealing ice cream and knocking down a person on the street and stealing his iPod is wrong.

And on that point, of course, there was substantial evidence, that is, there was evidence that gives rise to a reasonable inference that Jesus felt guilt, and recognized the criminality of the undertaking. Here are a few more facts in the case: When the bystander spotted the five youths, they *all* were wearing black hooded sweatshirts, but the hoods were not on their heads. Then, as the group approached the ice cream cart, they all pulled their hoods over their heads and moved faster as they crossed the street. The elderly ice cream vendor fell to the ground and screamed. When one or two of the youths saw the bystander, they ran across the street into a mobile home park -- that is, they fled.

Such facts are no less compelling than those in *People v. Lewis* (2001) 26 Cal.4th 334. That was a death penalty case in which the prosecution introduced evidence, as a factor in aggravation, of a *previous* murder done when the defendant was nearly 14 years old -- he poured gasoline into a car in which the victim was sleeping, threw a lighted match into it, then fled the scene (*Id.* at pp. 376, 379.) The issue was whether there was substantial evidence that the previous murder had been committed with knowledge of its wrongfulness under section 26. The *Lewis* court found that the minor's age, his flight from the scene, and conflicting statements to detectives, which suggested an intent to conceal his actions, amounted to "clear proof that defendant knew the wrongfulness of his act." (*Id*. at p. 379; see also *In re Gregory S.* (1978) 85 Cal.App.3d 206, 212 [minor's "understanding of the situation is manifested inter alia by his flight from the vehicle following pursuit and by the two different stories he gave to the officers."].)

As in *Lewis* and *Gregory S.*, we have flight. As in *Lewis*, we have a nearly 14-year-old minor. As in *Lewis* and *Gregory S.*, we have attempts to conceal connection to the crime, there by telling falsehoods to officers, here by use of the hood. Moreover,

in this case, we have the particular choreography of crime, with five youths dressed alike and uniformly fixing their hoods, then accelerating across the street as if they were conducting a semi-well-planned assault. A trial court may consider "the attendant circumstances of the crime, such as its preparation, the particular method of its commission, and its concealment" (*In re Tony C.* (1978) 21 Cal.3d 888, 900), and such factors here seem particularly damning. Not to mention the jackal-like picking through of an old woman's stock in trade.

Jesus' brief asserts, based on certain comments of the trial court, that it improperly applied an objective standard to the question of whether Jesus knew the wrongfulness of his actions when it should have applied a subjective standard. The context of the comments was that Jesus' trial counsel had made the point that even "adults don't understand aiding and abetting." Then the trial judge, after first noting that a robbery had been proven, turned to the issue of section 26. He recognized that Jesus had just turned 14 "a mere seven days" after prior to the crimes, and then said: "Whether [Jesus] knew in his mind that being a part of a group of young people around another person and forcefully removing an iPod from that person, whether he knew that even though he was not physically removing that iPod, or physically placing the victim in a chokehold, I have no way of getting into his mind to know if he knew that or not. My job, however, is to find whether or not a reasonable person in his position at age 13 going on 14, knew that that kind of conduct was wrong, and if it has not been proven by clear and convincing evidence."

There are times -- comparative literature is often the most obvious -- when passages of text must be read with reference to extrinsic sources that may prove the source of allusions within the considered text.[4] The Attorney General here, in an impressive display of that technique, points out that the trial court's language before us now is remarkably similar to a passage on page 379 of *Lewis*: "Noting that it is nearly impossible to 'recreate the mental state' of a 13 year old 16 years later, defendant argues

[4] A fairly common example is Eliot's line, "April is the cruelest month," which opens his poem, The Waste Land, the contextual meaning of which is illuminated by its contrast with the April reference in the opening of the prologue to Chaucer's Canterbury Tales.

it is inherently unfair and violates due process that the jury and trial court here made this determination. We disagree. *A trier of fact making a section 26 determination does not attempt to read the mind of the minor, but considers the objective attendant circumstances of the crime* -- such as its preparation, the method of its commission, and its concealment -- to determine whether the minor understood the wrongfulness of his or her conduct. . . . 'Reliance on circumstantial evidence is often inevitable when, as here, the issue is a state of mind such as knowledge.' . . . Though deliberating nearly 16 years after Rogers's murder, the jury and trial court could ascertain the circumstances of the crime from the testimonial witnesses." (*Lewis, supra*, 26 Cal.4th at p. 379.)

It is hard to fault a trial court for, evidently, having open the very pages of a Supreme Court case governing a topic when addressing that topic in open court. Plus, since the context of the trial court's remarks was the addressing of defense counsel's argument about aiding and abetting, the most natural reading of the remarks is that the trial court was merely emphasizing, in the *Lewis* court's phrase, how the objective circumstances of the crime clearly pointed to actual knowledge of wrongfulness. After all, the Supreme Court itself had employed that very approach on the page which the trial judge was (probably) looking at at the time, when the high court observed: "Indeed, we would find it difficult to conclude that a 13 year old would not know it is wrong to douse a man with gasoline and throw a lighted match." (*Lewis, supra*, 26 Cal.4th at p. 379.)

In any event, any arguable error was harmless, since, given the trial judge's remarks and the overwhelming evidence that Jesus knew his actions were wrong -- the hood and flight just will not permit any innocent explanation -- there is no probability (we won't even add the qualifier, "reasonable") that the result would have been any different. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [necessity of reasonable probability that error would have made a favorable difference for defendant].)

III. DISPOSITION

The findings that Jesus committed robbery and petty theft are affirmed.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.